

# **FUNDAMENTALS OF TRIAL ADVOCACY COURSE**

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## **THE INTOXILYZER 9000, WHAT YOU NEED TO KNOW**

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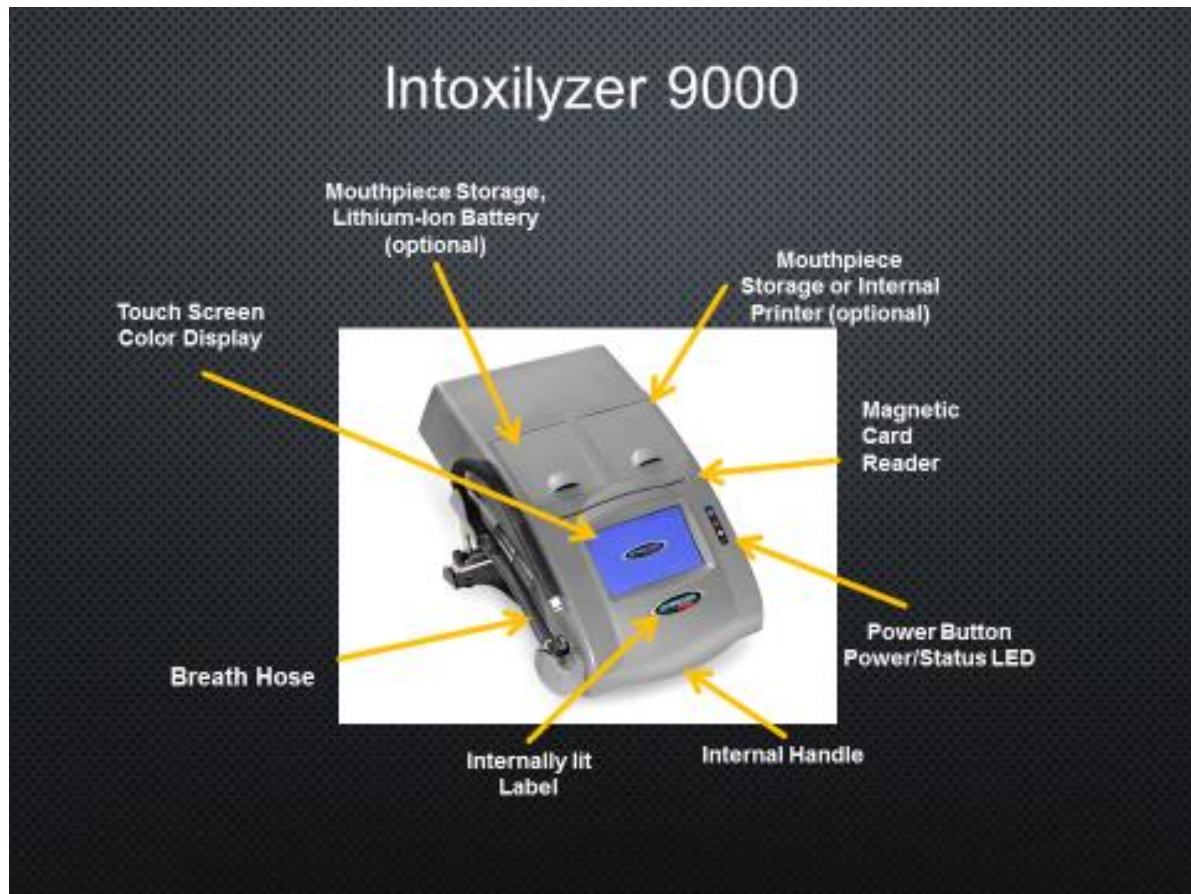
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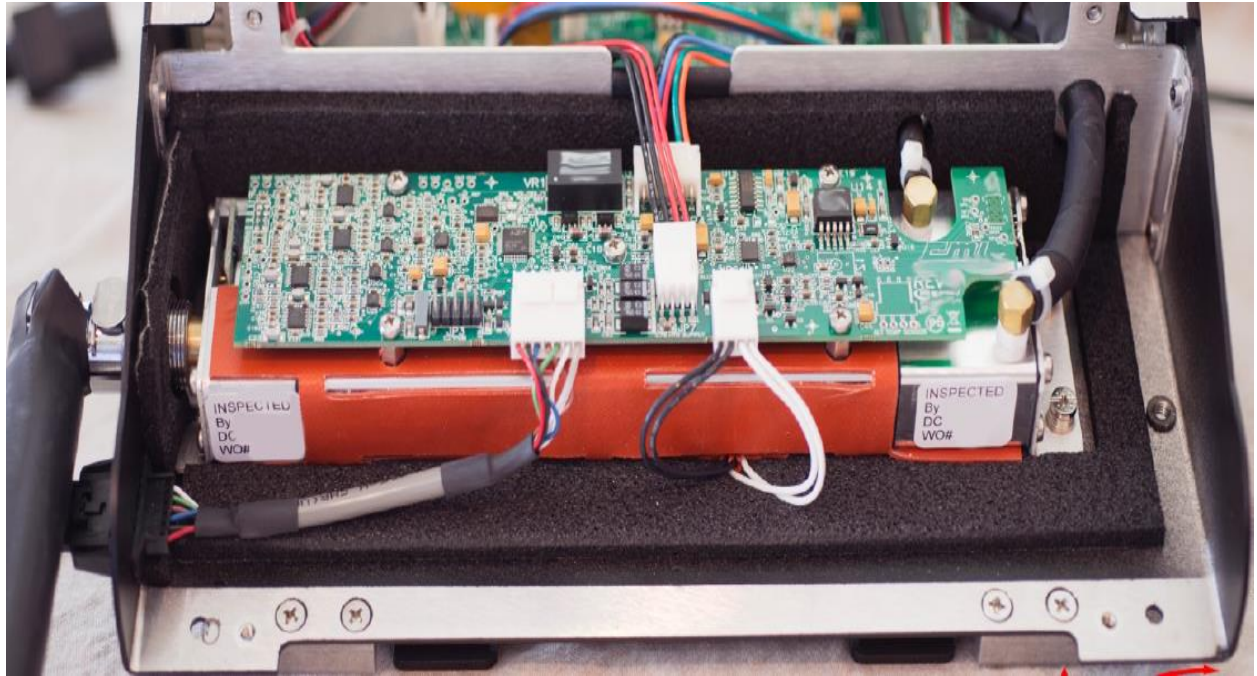
# Introduction to the Intoxilyzer 9000

- DPS Crime Lab may start using Intoxilyzer 9000s by the end of 2018
- Officers will need to be certified on the 9000 (even if already certified on the 8000) if admission is through the breath test statute – otherwise use Rule 702
- When introduced, the new instruments will be phased in
  - Introduction will be gradual at first
- The Intoxilyzer 9000 is extremely automated for the officer operator
- It is much easier for the suspect to blow into the Intoxilyzer 9000
- There will be separate checklists for the 8000s and the 9000s
- The operator checklist for the Intoxilyzer 9000 will be streamlined
- The protocol for the 9000 will ensure the officer conducts a proper 15-minute deprivation period
- The 9000 requires officer to remove the mouth piece after each breath sample
- When a gas tank is changed on the Intoxilyzer 9000, it will automatically start a calibration check on the new tank
- The Intoxilyzer 9000 instruments will give a notice before the annual preventative maintenance is due and then shut off until it is performed.
- Intoxilyzer 9000 instrument may have any or all of the following:
  - Magnetic swipe card
  - Barcode scanner
  - Touch screen keyboard
  - External USB keyboard
- Battery backup is built into the Arizona Intoxilyzer 9000 models
- Intoxilyzer 9000s will have LAN connectivity
- NIST traceable dry gas simulator

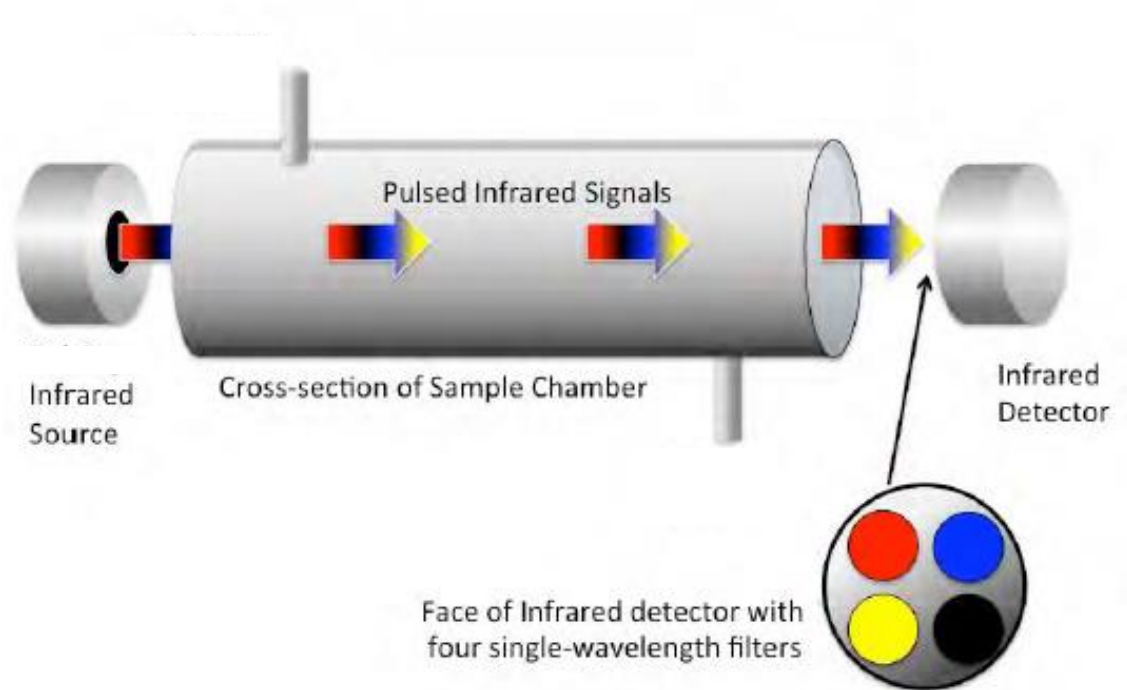
# Documentation for the Intoxilyzer 9000

- Breath Test Print Card
- Operator checklist
- 31- day check (no 90-day check – they will be combined)
- Other maintenance records will be available from the DPS lab
- Documentation for the 8000s will stay the same





## Four wavelengths of infrared light



## Multiple communication ports

# Specifications

## Multiple Wavelength

Analyzes sample using multiple IR wavelengths

## Range

0.000 to 0.650 gram/210 liters to 0.650 gram/210 liters

## Accuracy

±3% or ± .003 grams/210 liters (whichever is greater)

## Precision

Standard deviation of .003 or better

## Operating System

Microsoft Windows CE 6.0

## Approximate Dimensions

	w/Gas	w/o Gas
Length	19"	14 ½"
Width	14"	14"
Height (lowered)	6 ¾"	6 ¾"

## Weight

w/Gas	w/o Gas
12 lbs.	10 lbs.

## External Printer

USB compatible PCL LaserJet

## Memory

128 MB RAM, 512 MB Nand Flash, Optional Internal SD Card slot for memory expansion up to 32 GB.

## Warranty

Instrument has a standard one (1) year warranty.



# Quick Breath Test Legal References

## Admissibility –

- ARS § 28-1323(A) - Breath Test Admissibility Statute

Breath test results are admissible in any trial, action or proceeding with the following foundation:

- 1. A DPS approved device was used.
- 2. The operator was breath test certified on the instrument used.
- 3. Duplicate tests were administered and the test results were within 0.02 alcohol concentration of each other
- 4. The operator who followed the DPS checklist
- 5. The device used to conduct the test was in proper operating condition. (bracketing calibrations on the checklist, monthly calibration records, and/or standard quality assurance records.)
- Evidence Rule 702/*Daubert* (*Deason*). [Rarely used, but sometimes necessary.]

## Courts cannot require more than the breath test statutory provisions to admit the breath test

- ARS § 28-1323(B) [Compliance with subsection A of this section is the only requirement for the admission in evidence of a breath test result.]
- *See, State v. Duber*, 187 Ariz. 425, 930 P.2d 502 (App. 1996).
- *See, State v. Superior Court (Stock, RPI)*, 181 Ariz. 202, 888 P.2d 1389 (1995).

## Records of periodic maintenance (calibration records, standard quality assurance records, maintenance records) that show the device was in proper operating condition are admissible and are public records.

- ARS § 28-1323(A)(5)

**The breath testing statute is not unconstitutional**

- *State ex rel. Collins v. Seidel (Deason, Real Party in Interest)* 142 Ariz. 587, 691 P.2d 678 (1984).
- *State v. Leonard*, 151 Ariz. 1, 5, 725 P.2d 493 (App. 1986).

**The fact that the source code, software, etc. is not available is not a basis for suppression**

- ARS § 28-1323(C)
- ARS § 28-1388(B)

**The State does not have to collect or preserve a second sample of the suspect's breath when duplicate tests are given.**

- ARS § 28-1388(B)
- *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App. 1993).
- *State v. Bolan*, 187 Ariz. 159, 927 P.2d 819 (App. 1996).

**Testimony of the officer will generally satisfy 28-1321(A)(4) even if disputed by the defense. The deprivation period is a part of the checklist & officer testimony of officer is generally sufficient.**

- *State v. King*, 213 Ariz. 632, 146 P.3d 1274 (App. 2006).

**The breath test statute does not require the same officer to conduct the entire 15-minute deprivation period.**

- *State v. Tyszkiewicz*, 209 Ariz. 457, 459 - 60, 104 P.3d 188 (App. 2005).



**Lack of foundation objections – person objecting is required to indicate what is lacking.**

- *State v. Rodriguez*, 186 Ariz. 240 (1996)
- *State v. Reidhead*, 22 Ariz.App. 420 (1974).

**Defendant's refusal of breath (or blood) test is admissible and a question of fact for the jury. (The State should get a jury instruction).**

- ARS § 28-1388(D)
- *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989).

**Evidence of refusal is not testimonial evidence. The State may comment at trial and argue reasonable inferences.**

- *State v. Superior Court (Ahrens, Real Party in Interest)*, 154 Ariz. 574, 578, 744 P.2d 675, 679 (1987).
- *South Dakota v. Neville*, 459 U.S. 553, 556 (1983).
- *Pennsylvania v. Muniz*, 496 U.S. 582 fn 19 (1990).
- ARS § 28-1388(D)

**If the MVD Hearing Officer finds the suspect did not refuse the breath (or blood) test, that ruling is not admissible in any later proceeding - including a DUI trial.**

- ARS § 28-1321(N)

**Good opinions recognizing reliability of duplicate breath tests.**

- *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (App. 1993).
- *State v. Bolan*, 187 Ariz. 159, 927 P.2d 819 (App. 1996).

**Disagreements between expert witnesses go to the weight, not admissibility.**

- *State v. Velasco*, (*Alday*, RPI), 165 Ariz. 480, 486, 799 P.2d 821, 827 (1990).

**Where there is a lack of unanimity in the scientific community on the accuracy of a breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." (Should apply to blood tests also.)**

- *State v. Olivas*, 77 Ariz. 118, 267 P.2d 893 (1954).

**Court cannot grant a Rule 20 motion for the so-called margin of error. (NOTE: There is no built in 10% margin of error).**

- *State ex rel. McDougall v. Superior Court* (*Gurule*, Real Party in Interest), 178 Ariz. 544, 875 P.2d 203 (App. 1994).

**Instructing the jury that "records of periodic maintenance are *prima facie* evidence that the breath test instrument was working properly" is appropriate and does not shift the burden.**

- *State v. Peraza*, 239 Ariz. 140, 147, 366 P.3d 1030 (App. 2016).
- *State v. O'Haire*, 149 Ariz. 518, 521, 720 P.2d 119, 122 (App. 1986).

**Breath tests do not have to be collected within two hours. The State may retrograde breath test results administered outside the two-hour window to anytime within the two-hour window.**

- *State ex rel. O'Neill v. Superior Court (Kankelfritz, Real Party in Interest)* 187 Ariz. 440, 441, 930 P.2d 517 (App. 1996).
- *State v. Claybrook*, 193 Ariz. 588, 590, 975 P.2d 1101 (App. 1998).

**The State is not collaterally estopped from admitting breath test results during a retrial for 28-1381(A)(1) even where a jury previously found the defendant not guilty of violating 28-1381(A)(2).**

- *State ex rel. McDougall v. Superior Court (Steen, Real Party in Interest)* 179 Ariz. 279, 877 P.2d 1351 (App. 1994).

**Breath test records may be placed on computer storage and this duplicate is deemed an original and is admissible with proper certification.**

- ARS § 28-1327
- Records obtained or maintained under ARS § 28-1327 are admissible in any trial, action or proceeding (ARS § 28-1323(D))

**An Officer with reasonable suspicion of DUI may request a PBT prior to arrest**

- ARS § 28-1322(A)